(2)

No. 04-87

FILED
AUG 19 2004
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

KOYO SEIKO CO., LTD.
AND KOYO CORPORATION OF U.S.A.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF RESPONDENT, THE TIMKEN COMPANY, IN OPPOSITION

Terence P. Stewart
Counsel of Record
William A. Fennell
Patrick J. McDonough
Amy S. Dwyer
STEWART AND STEWART
2100 M Street, N.W.
Washington, D.C. 20037
(202) 785-4185
Counsel for Respondent, The Timken Company

QUESTIONS PRESENTED

The Timken Company does not agree that petitioners, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (hereinafter "Koyo"), have correctly identified the questions before this Court. Accordingly, Timken restates the questions presented:

1. Whether the Court of Appeals erred in finding that a Department of Commerce interpretation of the Tariff Act was reasonable even though it did not take account of certain WTO panel and Appellate Body reports which: (1) could not affect the imports at issue because they were adopted well after the date of importation; (2) the U.S. does not have to respond to at all; (3) the U.S., if it should choose to respond to them, has not yet done so and is entitled to consider how it will do so (if at all) for a reasonable period (generally between six and fifteen months); and (4) do not address the administrative review phase of antidumping duty proceedings here on appeal?

2. Whether the decision of the Federal Circuit is in conflict with other circuits as to the role of the *Charming Betsy* canon of statutory interpretation in the context of *Chevron* analysis of administrative agency action?

PARTIES TO THE PROCEEDING

Parties to the proceeding are: (1) the petitioners, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. and (2) the respondents, United States of America and The Timken Company.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The Timken Company does not have a parent company. No publicly held companies own 10% or more of the company's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
BRIEF OF RESPONDENT, THE TIMKEN COMPANY, IN OPPOSITION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	6
I. The Court of Appeals Could Not Err by Ignoring WTO Reports Which, By Law, Could Only Be Relevant To Later Imported Entries	7

TABLE OF CONTENTS – Continued

Page

II. The Court of Appeals Could Not Err by Ignoring WTO Reports Which the U.S. Could Choose to Ignore 11

III. The Court of Appeals Could Not Err By Failing To Follow A WTO Decision Not Yet Adopted or Implemented by the U.S. 12

IV. The Court of Appeals Had No Reason To Follow A WTO Decision Involving Conduct in Investigations When Considering the Correct Conduct For Administrative Reviews 14

V. There Is No Conflict Among the Circuits Over the Proper Application of the *Charming Betsy* Canon 16

CONCLUSION 19

APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Ali v. Ashcroft, 346 F.3d 873 (9th Cir. 2003) 16, 18

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984) ..... i, 16-19

Foster and Elam v. Neilson, 27 U.S. 253 (1829) 4

George E. Warren Corp. v. U.S. EPA, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999) 16-18

Murray v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ..... i, 6, 16-19

Statutes

Tariff Act of 1930, as amended:

19 U.S.C. § 1675(a) 2, 3, 14

19 U.S.C. § 1675(c) 2, 15

TABLE OF AUTHORITIES – Continued

Page

Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 3

19 U.S.C. § 3533(g) 2, 5, 6

19 U.S.C. § 3538(b) 2, 5, 6, 13

19 U.S.C. § 3538(c)(1) 2, 5, 9

WTO Dispute Settlement Decisions

European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R, adopted Mar. 1, 2001 ..... 8, 11, 14

Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996 12

United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/R, adopted March 19, 1999 15

TABLE OF AUTHORITIES – Continued

Page

United States — Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/R (Apr. 13, 2004)..... 14

United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, issued Aug. 11, 2004 ..... 8, 11, 13, 14

United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R, adopted Jan. 9, 2004 15

United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/R, issued July 16, 2004 15

International Materials

Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, *reprinted in* H.R. Doc. No. 103-316, vol. I (1994) 9, 14, 15

TABLE OF AUTHORITIES – Continued

Page

International Materials - Continued

Joined Cases C-27/00 & C-210/00, *The Queen v. Secretary of State for the Environment, Transport and the Regions ex parte Omega Air Ltd; Omega Air Ltd. Aero Engines Ireland Ltd, Omega Aviation Services Ltd. v. Irish Aviation Authority*, 2002 E.C.R. I-2569 12

Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), *reprinted in* H.R. Doc. No. 103-316, at 1327, vol. 1 (1994) 4, 10

Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 2, *reprinted in* H.R. Doc. No. 103-316, vol. I, 1654 (1994) 4, 5, 6, 10

TABLE OF AUTHORITIES – Continued

Page

Administrative Determinations

Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom, 65 Fed. Reg. 42667 (Dep't Commerce 2000) (revocation) 8

Issues and Decision Memorandum for the 1998-99 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan (A-588-604/A-588-054) (final results) (Mar. 7, 2001) 7, 14

IN THE
Supreme Court of the United States

No. 04-87

KOYO SEIKO CO., LTD.
AND KOYO CORPORATION OF U.S.A.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF RESPONDENT, THE TIMKEN COMPANY, IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Respondent, The Timken Company, hereby submits this brief in opposition to the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to those identified in the Petition, the following statutory provisions are involved in this case (they are set forth in the Appendix at App.1-22).

1. 19 U.S.C. § 1675(a), (c).

2. 19 U.S.C. § 3533(g).

3. 19 U.S.C. § 3538(b), (c).

STATEMENT OF THE CASE

The U.S. trade remedy laws provide remedies to domestic industries for unfair trade practices. Among those laws are the U.S. antidumping law. A domestic industry that has been harmed by imports of products sold at less than fair value ("dumped") in the U.S. can initiate an antidumping investigation by filing a petition with the U.S. Department of Commerce and the International Trade Commission. If the petition is in order, the two agencies will initiate investigations – Commerce will investigate allegations of dumping and the Commission allegations of harm to the U.S. industry.

At the conclusion of these investigations, if Commerce determines that the products have been dumped and the Commission determines that the domestic industry has been harmed thereby, the Commerce Department will issue an antidumping duty order on the product(s) covered by the petition.

This order results in the imposition of special duties (in addition to regular import duties) on the product(s) covered by the order. The amount of the duty is equivalent to the amount of dumping.

The U.S. has for many years calculated a weighted average dumping margin for a company or country by summing the amount of dumping found and dividing that number by the value of imports from the producer or country examined. Where certain imported sales were not dumped, no (or "zero") amount was added to the denominator.

After an antidumping duty order has been put in place, at the request of a foreign producer, importer, or member of the domestic industry, the Commerce Department will review later imports to determine whether dumping has continued and, if so, to what extent.[1] Such reviews typically cover products imported during a specific twelve-month period so that there may be many different reviews covering imports at different times that are conducted under a single order.

In 1994, the U.S. Congress passed legislation to implement U.S. obligations[2] (as the United States

---

[1] 19 U.S.C. § 1675(a).

[2] Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 ("URAA"). The WTO Agreement is not a self-executing agreement. It has been implemented into U.S. law by the URAA.

understood them) under the WTO Agreement which incorporates a series of trade agreements that the U.S. and many other nations had agreed to in Marrakesh.[3] One of the those agreements creates the WTO Dispute Settlement Body ("DSB").[4] The DSB

Justice Marshall has explained the difference between self-executing and non-self-executing treaties:

> Our Constitution declares a Treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract – when either of the parties engages to perform a particular act – the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court.

Foster and Elam v. Neilson, 27 U.S. 253, 314 (1829).

[3] *Marrakesh Agreement Establishing the World Trade Organization* (Apr. 15, 1994), *reprinted in* H.R. Doc. No. 103-316, at 1327, vol. 1 (1994) ("WTO Agreement").

[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex

establishes panels that address disputes between Member states; the result of a panel's efforts is called a panel report. A panel report may be appealed to the Appellate Body; the result of such an appeal is called an Appellate Body report. The DSB then decides whether to adopt a report.

The U.S. legislation implementing the Agreements includes detailed provisions that specify how, if at all, the adverse findings of a WTO report regarding U.S. law or practice are to be implemented under U.S. law.

Under the WTO Agreement and under U.S. law, the United States may choose whether or not to implement the recommendations of a panel or Appellate Body report.[5] Under U.S. law, any change that the U.S. chooses to make in its antidumping or countervailing duty practice in response to a WTO panel or Appellate Body report under the WTO Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures is prospective in nature so that it applies only to entries made on or after the date of the decision by the executive branch to make a change.[6]

2, *reprinted in* H.R. Doc. No. 103-316, vol. I, 1654 (1994) ("DSU").

[5] *See DSU*, Art. 22.1-2; 19 U.S.C. §§ 3533(g), 3538(b).

[6] *See* 19 U.S.C. § 3538(c)(1).

As provided for in U.S. legislation implementing the WTO Agreement, the U.S. executive branch, in consultation with the Congress, may choose a number of different responses to an adverse report, including: (a) doing nothing; (b) negotiating a resolution between the U.S. and the aggrieved WTO Member or Members; and (c) modifying U.S. law or practice to bring itself into conformity with its WTO obligations as construed by the WTO panel or Appellate Body.[7]

If it chooses to change its law or practice in response to a WTO panel or Appellate Body report, the U.S. will have a reasonable time to make the change.

REASONS WHY THE PETITION SHOULD BE DENIED

Koyo's petition asserts that there are important issues of federal law raised by the challenged judicial review of U.S. law: (1) does the *Charming Betsy* canon of statutory interpretation require the Federal Circuit to interpret U.S. law in light of certain WTO dispute settlement reports; (2) does the Federal Circuit's decision conflict with the decisions of other circuit courts?

Whatever the merits of these issues, this is not the case for this Court to address them. The specific

---

[7] *See DSU,* Arts.3.7, 22.1-2; 19 U.S.C. §§ 3533(g), 3538(b).

imports giving rise to this litigation precede the WTO reports in time so that by U.S. statute they cannot be affected. The U.S. has no obligation to take any action in response to WTO dispute settlement reports. Should the U.S. choose to respond, it may consider what response to make. It will have time after the report's adoption to consider that response. The proceedings on appeal are reviews, not investigations.

I. The Court of Appeals Could Not Err by Ignoring WTO Reports Which, By Law, Could Only Be Relevant To Later Imported Entries.

The administrative decisions of the Commerce Department that have been challenged by the petitioners cover imports of tapered roller bearings and parts from Japan during the period October 1, 1998 through September 30, 1999.[8] The antidumping duty order and finding covering tapered roller bear-

---

[8] *Issues and Decision Memorandum for the 1998-99 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan* (A-588-604/A-588-054) (final results of antidumping duty administrative reviews) (Mar. 7, 2001) (Pet. App. 120a) ("*Commerce Issues and Decision Memo*").

ings from Japan were revoked for all imports after December 31, 1999.[9]

There has been an adverse decision in a WTO case not involving U.S. law which found that a method for calculating dumping margins employing zeroing (during the investigation phase of an antidumping proceeding) was not in compliance with a WTO Member's obligations.[10] This report was not adopted until 2001, well after the imports of tapered roller bearings from Japan in 1998-99 and well after the antidumping duty order and finding covering those imports were revoked.

Another WTO dispute settlement proceeding that has considered the U.S. method of calculating dumping margins resulted in an Appellate Body report released on August 11, 2004.[11] That report

---

[9] *Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 Fed. Reg. 42,667 (Dep't Commerce 2000) (revocation), Opposition Appendix at App. 7.

[10] *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC — Bed Linen*"), WT/DS141/AB/R, adopted March 1, 2001.

[11] *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (issued Aug. 11, 2004) ("*US — Softwood Lumber*"). The report has not yet been adopted

found Commerce's margin calculation methodology in an antidumping investigation to be contrary to U.S. obligations under the Antidumping Agreement.[12]

Under U.S. law,[13] adverse WTO panel and Appellate Body reports adopted by the DSB which the U.S. chooses to conform to that affect antidumping or countervailing duty determinations apply only to imports entered on or after the date the U.S. chooses to implement the adverse report.

Hence, assuming *arguendo* everything else petitioners claim, there was no basis for the Court of Appeals for the Federal Circuit to find Commerce's actions inconsistent with U.S. law simply by virtue of a subsequent WTO Appellate Body report. Thus, there is no theory under which the Court of Appeals could have erred by not considering as controlling WTO reports which by law, if relevant at all, could only be relevant for imports after a point in time

---

by the WTO's DSB; it is likely to be adopted within a month.

[12] The "Antidumping Agreement" is shorthand for one of the WTO Agreements, the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade,* Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, *reprinted in* H.R. Doc. No. 103-316, vol. I (1994).

[13] 19 U.S.C. § 3538(c)(1). *See* Opp. Appendix at App. 21-22.

which is at least after the date of the WTO Appellate Body report's adoption.

Stated differently, petitioners lose even assuming *arguendo*:

- WTO Appellate Body reports that are not against the United States nonetheless control U.S. construction of its laws, regulations and practices once rendered;

- if it were to choose to adopt an adverse determination, the United States' right to a reasonable period of time to implement adverse rulings was not applicable in this case;

- the U.S. right under the DSU[14] not to implement adverse determinations where it chooses not to do so somehow does not relieve it of the asserted obligation to conform its construction of U.S. law, regulations and practice with WTO Appellate Body reports; and

- WTO Appellate Body reports in unrelated cases involving investigations are binding on the U.S. in its conduct of administrative reviews.

Not surprisingly, the petitioners are silent on this fundamental infirmity in their challenge.

---

[14] Art. 22.1-2.

As Timken reviews below, none of the four assumptions above is valid. This further demonstrates why there is no basis to examine the Court of Appeals review of the Commerce Department action because of one or more WTO Appellate Body reports.

II. The Court of Appeals Could Not Err by Ignoring WTO Reports Which the U.S. Could Choose to Ignore.

As we have seen, the United States, along with all other members of the WTO, reserved the right to determine how to act following an adverse panel or Appellate Body report, including the right not to adopt an adverse determination

Thus, assuming *arguendo* that there was an adverse determination directly relevant to the factual situation involved in this petition, the U.S. is under no obligation to conform to it. As petitioners must acknowledge, the U.S. has taken no action to modify U.S. regulation or practice to implement the adverse determination(s)[15] cited by Koyo (and indeed the second decision has not yet been adopted by the WTO's DSB and the reasonable period of time to implement, if the U.S. chooses to implement, has not yet been identified or run).

In such a situation, there can be no basis for finding that a construction of the WTO obligations

---

[15] *EC — Bed Linen* and *US — Softwood Lumber*.

which the U.S. is not required to implement controls whether or not the agency in question construed U.S. law correctly.[16] Thus, this petition for *certiorari* should be denied.

III. The Court of Appeals Could Not Err By Failing To Follow A WTO Decision Not Yet Adopted or Implemented by the U.S.

Only one of the two WTO findings relied on by petitioners involved the United States practice of "zeroing": the decision of the Appellate Body in *US – Softwood Lumber*.[17] That finding was rendered on

---

[16] The Court of Justice for the European Communities has held that it is not bound by the WTO agreements, saying "to require the judicial organs to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility of finding negotiated solutions, even on a temporary basis." Joined Cases C-27/00 & C-210/00, *The Queen v. Secretary of State for the Environment, Transport and the Regions ex parte Omega Air Ltd; Omega Air Ltd. Aero Engines Ireland Ltd, Omega Aviation Services Ltd. v. Irish Aviation Authority*, 2002 E.C.R. I-2569, ¶¶ 89-90.

[17] The WTO Appellate Body has explained that adopted reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute." *See Japan – Taxes on Alcoholic*

August 11, 2004 and has not as yet been adopted by the WTO Dispute Settlement Body. Once adopted, the U.S. will have a reasonable amount of time (generally six months to fifteen months) to implement the adverse ruling (again, if it chooses to implement versus doing nothing or paying compensation, etc.).

U.S. law identifies the steps that are to be taken where the executive branch is desirous of implementing an adverse ruling in an antidumping investigation or review.[18] Even if we assume *arguendo* that the August 11, 2004 *US — Softwood Lumber* decision is potentially relevant to the underlying fact situation, it provides no basis for a writ of certiorari.

The decision has neither been adopted nor has the reasonable period of time for implementation run, and U.S. statutory requirements for considering a modification have not been fulfilled. Indeed, the AB decision had not been rendered at the time of the Court of Appeals decision. Thus, there is no basis for finding that the Court of Appeals erred because it upheld the Commerce Department's construction of U.S. law without regard for a WTO decision not yet adopted or implemented by specific U.S. action.

Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996, Section E.

[18] 19 U.S.C. § 3538(b).

IV. The Court of Appeals Had No Reason To Follow A WTO Decision Involving Conduct in Investigations When Considering the Correct Conduct For Administrative Reviews.

Koyo relies on one adopted WTO Appellate Body report (*EC — Bed Linen)* and one panel report that was still pending appeal at the time that it filed its petition[19] finding "zeroing" during investigations to be inconsistent with Article 2.4.2 of the Antidumping Agreement. Pet. 9-10, 15-16. Neither of these decisions pertains to what is permissible conduct in administrative reviews. The proceedings here on appeal were administrative reviews, not investigations.[20]

Prior WTO Appellate Body decisions and panel reports have found obligations relevant to investigations may not be relevant to reviews.[21]

---

[19] *United States — Final Dumping Determination on Softwood Lumber from Canada,* WT/DS264/R (Apr. 13, 2004).

[20] *See Commerce Issues and Decision Memorandum*, Pet. App. 120a.

[21] Under the Antidumping Agreement, the administering authority can conduct various types of reviews of imports subject to an antidumping duty order, including what are called "administrative reviews" (Art. 9.3) and "sunset reviews" (Art. 11.3) in the United States. *See* 19 U.S.C. §§ 1675(a) &

Thus, even assuming *arguendo* that courts should construe U.S. law to be consistent with WTO decisions regardless of whether the U.S. has chosen to implement an adverse ruling, there is no basis for a writ of certiorari.

1675(c). WTO panels and the Appellate Body have recognized that provisions in the Antidumping Agreement distinguish between the investigation and review phases of antidumping proceedings and can be limited to one or the other. *See United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted March 19, 1999, paras. 6.83-91 (Article 5.8 *de minimis* requirement in investigations does not apply to Article 9.3 reviews); *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted Jan. 9, 2004, paras. 106-07 ("'original investigations and sunset reviews are distinct processes with different purposes'"); *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, issued July 16, 2004, paras. 7.190-91 (Articles 3.7 and 3.8 injury requirements do not apply to Article 11.3 sunset reviews). Commerce's determination at issue in this case was made in the context of an administrative, not a sunset, review.

Since the reports relied on by Koyo pertain to conduct in investigations and not to conduct in administrative reviews, there is no basis for finding that the Court of Appeals erred in upholding the Commerce Department's construction of U.S. law. Commerce had no reason to follow any WTO decision(s) involving conduct in investigations when considering the correct conduct for administrative reviews.

V. There Is No Conflict Among the Circuits Over the Proper Application of the *Charming Betsy* Canon.

Petitioners assert that there is a conflict among the circuits "over the role of the *Charming Betsy* canon in cases that involve *Chevron* review of agency interpretations." Pet. 18. In particular, petitioners claim that the Federal Circuit's decision below conflicts with a decision of the D.C. Circuit, *George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999), and a decision of the Ninth Circuit, *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003). Petitioners' asserted conflict does not exist.

Review of the cited cases shows that no conflict exists. In neither case did the court rely on the *Charming Betsy* canon to reject an agency's interpretation of an ambiguous statute that conflicted with U.S. international obligations. Rather, the courts in the cited circuit decisions applied *Chevron* prong-two analysis to an agency's statutory interpretation. Ref-

erences to the *Charming Betsy* canon in the cited decisions were merely collateral.

Rather than reflect a conflict, the D.C. Circuit's decision in *Warren* actually illustrates the workings of the statutory scheme established by Congress to address adverse WTO panel and Appellate Body reports. The *Warren* decision shows how the U.S. follows the statutory scheme for responding to an adverse WTO panel or Appellate Body report when it chooses to comply with the report's recommendations.

The *Warren* case concerned the Environmental Protection Agency's (EPA) promulgation of regulations regarding standards for reformulated gasoline. The EPA's initial rule (1994) was found by a WTO panel and Appellate Body to be inconsistent with U.S. obligations under the General Agreement on Tariffs and Trade (GATT) because it discriminated against imported gasoline. Following the Appellate Body report, the United States decided to comply with the DSB's recommendations, and, following the statutory scheme, the EPA issued a new regulation (1997) after conducting a rulemaking proceeding.

In *Warren,* the court held that the EPA's issuance of the new regulation was reasonable and permissible under the relevant statute and, therefore, accorded *Chevron* "prong two" deference to the EPA's regulation. *Warren*, 159 F.3d at 623-24. The court noted that while the WTO report "in the background" "bolstered" the court's determination to uphold the EPA's regulation, the *Charming Betsy* canon played

no role in the court's *Chevron* analysis. *Warren*, 159 F.3d at 624.

So also, no conflict exists between the appeals court decision below and the decision of the Ninth Circuit in *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003). In that case, the Immigration and Naturalization Service (INS) claimed statutory and regulatory authority to remove aliens to countries that did not have functioning governments to accept them. Applying a *Chevron-two* analysis, the court held that the INS' position was not authorized by statute nor supported by either INS policy or regulations. *Ali v. Ashcroft*, 346 F.3d at 881-882, 884-885.

Therefore, because the government's position was inconsistent with existing INS policy and regulations, the court held that the government's proposed construction of the statute was not entitled to *Chevron* deference. *Ali v. Ashcroft*, 346 F.3d at 885. The court's holding was based upon a review of the relevant statute, regulations and INS policy. The *Charming Betsy* canon played no role in the court's *Chevron* analysis. All the court said in that respect was that its construction of the statute was further supported by its being consistent with international law. *Ali v. Ashcroft*, 346 F.3d at 885.

In the cases cited by petitioners, as in the appeals court decision below, the courts similarly applied a *Chevron-two* analysis to agency action without regard to the *Charming Betsy* canon. Thus, these circuit decisions are not in conflict with respect to

application of the *Charming Betsy* canon in the context of a *Chevron* analysis of agency action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

TERENCE P. STEWART
Counsel of Record
WILLIAM A. FENNELL
PATRICK J. MCDONOUGH
AMY S. DWYER
STEWART AND STEWART
2100 M STREET, NW
WASHINGTON, DC 20037
(202) 785-4185
Counsel for Respondent,
The Timken Company

Dated: August 19, 2004